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HAROLD B. WILLEY

No. 329

IN THE

# Supreme Court of the United States

**October Term—1952**

FRANK COSTELLO,

*Defendant-Petitioner,*

—against—

UNITED STATES OF AMERICA,

*Plaintiff.*

## PETITION FOR REHEARING ON APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE WOLF,
*Attorney for Petitioner.*

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*To the Chief Justice and Associate Justices of the Supreme Court of the United States:*

The above-named defendant-petitioner respectfully prays for a rehearing of his petition for a writ of certiorari, which petition was denied by this Court on November 10, 1952.

Petitioner was convicted upon ten counts of contempt of a Committee of the United States Senate, and sentenced to 18 months imprisonment and fines totaling $5,000. Upon appeal to the United States Court of Appeals, Second Circuit, the conviction was reversed as to seven counts and affirmed as to three, the latter carrying the total sentence. The reversal was predicated upon petitioner's lawful assertion of privilege against self-incrimination in several instances and upon the improper multiplication of contempts in others.

The original petition presented substantial points of law, including the following: (1) The Court of Appeals correctly held that three counts (as to which the privilege against self-incrimination was applicable) should never have been submitted to the jury. Nevertheless, everything that was said, argued and charged on these counts was of a character as gravely to prejudice the fair and dispassionate consideration of the other counts. Petitioner is entitled to a trial free from and unaffected by these harmful matters. (2) Petitioner's prompt testifying cancelled any initial refusal and negatived any possible claim of obstruction, so that there could be no contempt. (3) Evidence strongly tending to show good faith and to rebut any element of wilfulness was erroneously excluded. (4) The prosecution improperly was extended to alleged acts outside of the scope of the Senate resolution and certification which constituted the legal limits of permissible indictment. (5) The sentence exceeded the penalty permitted by the statute.

Petitioner asks the Court to reconsider and re-examine the foregoing contentions, any one of which, if sustained, would operate to vitiate the conviction. None of the errors complained of is to be deemed technical, the majority of them being addressed squarely to the fundamental issue of guilt or innocence, while simultaneously subject to appellate correction—as distinguished from any factual argument.

An examination of the lengthy record in its entirety cogently suggests that petitioner was innocent of all the offenses charged. This becomes particularly apparent when the unusual statutes under which the conviction was had (2 U. S. C. A. Secs. 192 and 194) are scrutinized Section

192, dealing with witnesses summoned by authority of either House, creates two classes of offenses. One is where a witness "wilfully makes default;" the other is where a witness "refuses to answer any question pertinent to the question under inquiry" The sustained counts herein relate to the first classification, namely, where the witness wilfully makes default. Section 194 requires certification to the appropriate prosecutor in three classes of cases: whenever a witness "fails to appear to testify," "fails to produce any books, papers, records, or documents, as required," or "refuses to answer any question pertinent to the subject under inquiry." A comparison of the statutes with the facts in the instant record is strongly indicative that petitioner did not wilfully make default (denounced by Section 192); and that he never unlawfully did anything for which there could be any proper certification under Section 194.

The discrepancy between the facts and the statutes is further emphasized by the circumstance that the Court of Appeals' consideration of the case may well have been affected by the fact that that tribunal apparently proceeded under the language of Section 194 prior to its amendment in 1936 and 1938. As was pointed out in a footnote of the original petition (although perhaps insufficiently stressed), the Court of Appeals actually quoted Section 194 in full in its opinion as that statute had read before the amendments. The old law called for certification "whenever a witness summoned as mentioned in section 192 of this title fails to testify," and the only condition for certification was that "the facts are reported to either House." Under the amendments there must be a report and filing of "a statement of fact constituting such failure." These changes

tend to sustain petitioner's argument calling for deliberative rather than routine action by the Senate as a condition pre edent to possible prosecution. In any event, where the course of events is susceptible of subtle inferences, petitioner was entitled at the very least to have his cause determined by the statutes as they exist and not as they once were.

As has heretofore been mentioned, this entire prosecution has been one *ad hominem* rather than *ad delictum*. That the indictment herein should be made an instrumentality for punishing petitioner for matters outside of its proper scope is abhorrent to fundamental notions of justice. Petitioner seeks merely the same consideration that would be accorded to any other individual. This Court has unfailingly recognized that right and has dedicated itself to the preservation of the Aristotelian doctrine that "The only stable state is the one in which all men are equal before the law" (Politics, Ch. V).

For the foregoing reasons, as well as those set forth in the original petition, petitioner respectfully asks for a rehearing and reconsideration of his petition, and that upon such rehearing the application for a writ of certiorari should be granted.

Dated: New York, N. Y., November 24, 1952.

Respectfully submitted,

GEORGE WOLF,
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GEORGE WOLF,
JACOB W. FRIEDMAN,
*of Counsel.*